Loss of Distance: Global Corporate Actors and Global Corporate Governance[1]—Internet v. Geography

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I. Geography[2]

By tradition law is a subliminally geographical concept as all ideas about order start from the natural environment and are, therefore, geographical in their inner core.[3] The Greek term *nomos* (compare *anomal*) indicates "pastural land" (compare *nomade*), and the modern terms tax haven and offshore corporations demonstrate the ongoing relevance for the business world.[4] But it is exactly this concept that is weakening or withering away because of new technologies, a development that led Richard O'Brien to announce "the end of geography."[5]

A. LIMITS

The term "global corporate actors" also has a geographic connotation: it refers to the growth and interconnection in trade and financial markets across national boundaries by the ability to use technology rapidly and, thus, widely increase the international flow of know-how, assets, and capital in size and speed ("global village").[6] It tells us that corpora-

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1. Richard M. Buxbaum, *Corporate Governance Monitoring the Whys and Hows*, 6 AUSTRALIA J. CORP. 309 (1996).

2. *See* BERNHARD GROSSFELD, INTERNATIONALES UND EUROPAEISCHES UNTERNEHMENSRECHT (2d ed. 1995); DETLEV F. VAGTS, TRANSNATIONAL BUSINESS PROBLEMS 100 (2d ed. 1998); Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

3. *See* Bernhard Grossfeld, *Geography and Law*, 83 MICH. L. REV. 1510 (1984).

4. *See* BERNHARD GROSSFELD, KERNFRAGEN DER RECHTSVERGLEICHUNG 43 (1996); BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 75 (1990).

5. *See* RICHARD O'BRIEN, GLOBAL FINANCIAL INTEGRATION: THE END OF GEOGRAPHY (1992).

6. *See* Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 60 (1998).

tions are by definition just everywhere.[7] But the term "global" is *Delphi*: it also tells us that "geography" as a link between particular locations and particular rules loses its attraction. Where are the global actors located; where is their center of gravity; and what location legitimizes the application of local rules to the whole or to parts of the "entity"? The geography of economic globalization is strategic and creates a new grid of economic transactions superimposed on the old geo-economic patterns. What is then left of the traditional geographical pictures serving as a genuine link for regulation, be it country or state? Is the old hierarchy still intact?

A global corporation can quickly make decisions and allocate resources internationally on the basis that the whole is more than the sum of the parts. We are confronted with a vast network for marketing and servicing products with highly diversified centers of activity. The global corporation is also a perfect example for the proposition that technology and reduction of transaction and coordination costs are important factors in shaping the law.[8] The rise and fall of transaction costs destroys old and constitutes new markets—and markets make law, inevitably!

"The subjugation of human lives to the influence or control of corporate actors on the international plane is a matter of contemporary concern for many."[9] The Brandeis view of the "Frankenstein monster" from his famous dissent in *Louis K. Liggett Co. v. Lee*[10] rises to global dimensions. It cries for action.[11] Small wonder that the developing experience with global corporations—they themselves a product of transaction costs—is producing and accelerating innovative regulatory approaches.

B. New Technology

This change goes along with a change from the "real" world into the "virtual" world of cyberspace. Due to new technology, in particular the Internet, geographical location in the real world does not matter as much or as less than hitherto.[12] Cyberspace is an invisible, intangible world of electronic information with manifold interactions; by decreasing transaction and coordination costs, it eliminates space and time; it makes distances and borders largely disappear. Consequently, firms have a much wider choice of actions and locations; markets often have no "fixed abode."[13] Computers, telephones, and planes create a virtual world that does not need its anchor in a particular territory. New communication technologies have erased former barriers to economic exchange and governments lose "their formerly uncontested powers of sovereignty."[14] Entrenched principles about state intervention and individual freedom are doomed to conflict.[15]

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7. *See id.* at 58.

8. *See* Grossfeld, *supra* note 4, at 82.

9. Fluer Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law, and Legal Theory*, 19 Melb. U. L. Rev. 893, 922 (1994).

10. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541, and 567 (1933).

11. *See* Bernhard Grossfeld, *Internationalisierung und internationale Rechnungslegung als Fuehrungsaufgabe*, 4 Die Aktiengesellschaft (AG) 155 (1999).

12. *See* Trevor Cox, *Information and the Internet: Understanding the Emerging Legal Framework for Contract and Copyright Law and Problems with International Enforcement*, 11 Transnat'l Law. 23 (1998).

13. O'Brien, *supra* note 5, at 1.

14. Ignacio De Leon, *The Dilemma of Regulating International Competition Under the WTO System*, 3 Eur. Com. L. Rev. 162 (1997).

15. *See id.* at 165.

Certainly, not all geography is gone; it is still used as an evocative, often emotional, point of reference (i.e., "Deutsche Bank," "made in Germany," "Swiss watch," "Dutch cheese"). As far as corporations are concerned, there will also remain the conflict between more internationally oriented shareholders and more locally oriented stakeholders—and that is already part of our problem. But in general, the relevance of geography will be reduced to particular situations, be it because of physical barriers (Isle of Man), of climate (malaria), of travel expenses (St. Helena), or of language differences (Chinese). The less commodity-like the product is, the more likely geography is retained. Yet, as markets become integrated "the need to base decisions on geography will alter and often diminish."[16]

The modern economy depends on worldwide information and, in particular, its "bloodstream" money is an information product.[17] The medium is the message; signs control the meaning and the effects. The way in which the information is processed will influence its role. "Hence the radical change being experienced by information technology today."[18] Consequently legal authorities lose control over their territory. The disregard of national borders makes it difficult or just impossible for any individual state to regulate global corporations effectively.[19] However, this does not mean that the importance of state actors is simply evaporating. They will act as facilitators of the globalization process while producing new forms of legality.[20] They continue to provide and to control the court system and the means of enforcement. But the globalization creates regulatory inconsistencies and demands for a certain amount of re-regulation.

C. Old Problems

Though we might expect dramatic changes, the problems are not as new as they appear to be at first glance. Invisibility, virtuality, and cross-border activities accompany the corporation's legal existence from its very beginning; we are confronted with differences in degree not with totally unforeseeable problems. From the times of *Bank of Augusta v. Earle*,[21] we have learned that corporations are artificial beings, "enchanting fictions" and "lovely whimsies" as Archibald MacLeish called them.[22] Or, as the Supreme Court in *Bank of Augusta* pronounced:

> It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.[23]

Thus, invisibility and virtuality were closely connected with concepts of geography—but even more with loosening the grip of geography in view of cross-border transactions: the

16. O'Brien, *supra* note 5, at 2.
17. *See id.* at 7.
18. *Id.*
19. *See* Blackett, *supra* note 6, at 62.
20. *See id.* at 64.
21. Bank of Augusta v. Earl, 38 U.S. 519 (1839).
22. Archibald MacLeish, *Apologia*, 85 Harv. L. Rev. 1505, 1507 (1972); *cf.* Jean Stefancic & Richard Delgado, *Panthers and Pinstripes: The Case of Ezra Pound and Archibald MacLeish*, 63 S. Cal. L. Rev. 907 (1990).
23. *Bank of Augusta*, 38 U.S. at 588.

town of Augusta sits on the Southern bank of the Savannah River in Georgia, right off the border to South Carolina. Concepts and commercial necessities of "neighborhood," the lack of distance, limited the efforts for "localization" and opened the doors for a then "global" world. That is why the Supreme Court continued:

> But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognised as such by the decisions of this Court.[24]

A glance at the map predicts the court's decision. The necessities of cross-border business overcame geographical limits under the guise of "comity of nations,"[25] opening the door for a still unknown global future. Accordingly, Archibald MacLeish describes the "Corporate Entity" as follows:

> The Oklahoma Ligno and Lithograph Co
> Of Maine doing business in Delaware Tennessee
> Missouri Montana Ohio and Idaho
> With a corporate existence distinct from that of the
> Secretary Treasurer President Directors or
> Majority stockholder being empowered to acquire
> As principal agent trustee licensee licensor
> Any or all in part or in parts or entire . . .
> The Oklahoma Ligno and Lithograph Co
> Weeps at a nude by Michael Angelo.[26]

Though corporations may "not weep at the beauty of works of art, . . . they have more dramatic ways of demonstrating their independence of humanity"—exerting invisible power: "All of which goes to show that truth is indeed stranger than fiction—legal fictions included."[27]

II. International Law

A. Skepticism

Even today we are inevitably bound to concepts of geography. Thus, the real problem is not geography but the appropriate location as a link for regulation. Global corporations live in so many different places at the same time that possible regulatory links and competition abound. Although we all know that the multitude of unilateral, bilateral, and regional approaches is sub-optimal, we still meet deep skepticism towards transborder regulatory cooperation.[28]

So far, international law has done little to cope with transnational corporations.[29] Foremost was the creation of the Commission on Transnational Corporations in 1974. The

24. *Id.*
25. *Id.* at 589.
26. MacLeish, *supra* note 22, at 1507.
27. *Id.* at 1507–08.
28. *See* Johns, *supra* note 9; *cf.* Raymond Vernon, *Economic Sovereignty at Bay*, 47 Foreign Aff. 110 (1968).
29. *See* Johns, *supra* note 9, at 893.

Commission produced several Draft Codes of Conduct, the last in 1990. Such Codes were widely advocated as "non-legal" methods of advocacy. But consensus on a final Code was never achieved, and the Code never formally adopted. The possibility of such scheme is currently being mooted; it will likely remain just "a noble statement of principle," not drawing corporations to their rank.[30] Thus, international law is largely irrelevant to activities of transnational corporations.[31]

B. Workers' Rights

The question may, however, get a new turn in view of the international labor abuse by transnational corporations operating in economically developing regions, the key sentence being: "Nike is paying Vietnamese workers $1.60 a day, the minimum wage in Vietnam, but three basic meals there cost $2.10."[32] National laws and international law so far have not been successful in protecting workers' rights.[33] The World Trade Organization (WTO) as the primary regulator of trade throughout the world does not explicitly protect workers' rights. Corporate Codes of Conduct cannot fill the gap, though they may serve a benchmark function.[34] There is, however, the chance that the tide will turn.

The turning point may be the case *Doe v. Unocal Corporation*,[35] in which Burmese citizens stated claims against an American oil company for human rights abuses, including torture and slavery. The court invoked concepts of international law rules against slavery; it discussed the act of state doctrine and granted subject matter jurisdiction as long as Burmese citizens were unable to obtain access to judicial review in their own country because of the absence of a functional judiciary:[36]

> Because nations do not, and cannot under international law, claim a right to torture or enslave their own citizens, a finding that a nation has committed such acts, particularly where, as here, that finding comports with the prior conclusions of the coordinate branches of government, should have no detrimental effect on the policies underlying the act of state doctrine. Accordingly, the act of state doctrine does not preclude this Court from considering claims that are based on legal principles about which the international community has reached unambiguous agreement.[37]

III. Corporation Law

Geographical concepts still govern the choice of law in corporation law.[38] "Delaware," "corporate homes away from home," "state of incorporation," and "seat theory" are key

30. *Id.* at 914; Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Doing It?*, 15 Ariz. J. Int'l & Comp. L. 905, 914 (1998).

31. *See* Johns, *supra* note 9, at 898.

32. Toftoy, *supra* note 30, at 905.

33. *See* Labor Union of Pico Korea, Ltd. v. Pico Products, Inc., 968 F.2d 191 (2d Cir. 1992); International Labor Rights Educ. and Research Fund v. Bush, 954 F.2d 745 (D.C. Cir. 1991); and Alfaro v. Dow Chem., 751 S.W.2d 208 (Tex. Ct. App. 1988).

34. *See* David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 Case W. Res. L. Rev. 407 (1998).

35. Doe v. Unocal Corp., 962 F. Supp. 880 (C.D. Cal. 1997).

36. *Id.* at 899.

37. *Id.*

38. *See* Jack L. Goldsmith III, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 Yale L.J. 597 (1989).

words for the traditional approaches.[39] Consequently, Detlev Vagts based his seminal article on the regulation of transnational corporations on the notions of "home state" and "host state."[40] But is it still meaningful to reduce the legal life of global players to these links? Can they serve the needs of a global economy of a global regulation? Can they legitimize a regulation that is acceptable both for the global corporations and for the many countries in which they operate? Can we take "Delaware" out of her American context?[41]

A. Delaware

1. *Clash of Opinions*

The question has often been discussed with regard to Delaware's powerful position in corporate charters. Could this be a model for the world setting the standards for global corporate actors worldwide?[42] The critique started with Justice Brandeis's forceful dissent in *Liggett*, with terms like "race to the bottom," "state competition for corporate charters," and "Frankenstein monsters."[43] William L. Cary's article, *Federalism and Corporate Law: Reflections upon Delaware*,[44] launched a full attack—but evoked likewise powerful answers in support of Delaware.[45] Responding to Cary, the defenders argue that he failed to consider the interaction between law and market forces. They believe that the market in corporate shares will take care of the problem: if Delaware law would adversely affect the shareholders' interests, the value of a Delaware firm's stock would decline relative to stock in a comparable firm incorporated elsewhere. This would negatively affect managers by threatening their job (danger of hostile takeovers) and, thus, compel them to "seek the state whose laws are most favorable to shareholders."[46] This turns the picture upside down: from race-to-the-bottom to race-to-the-top! Too beautiful and too logical to be true! What is a comparable firm? How can shareholders find out? The reactions have statistical dimensions over time —who controls the statistics? What about management and propaganda? What does an outsider really know from paper?[47] In addition, markets need time to react—and what happens in the meantime in particular to small investors that cannot wait? Managers have ample means to retard market reactions and to use them in their favor—in particular, when they are not looking for long-term perspectives for themselves. Poison pills of all sorts would not be introduced into corporate charters if they would not be regarded or held out (towards timid spirits) as offering at least some help to foster management entrenchment.[48]

39. *See* Werner F. Ebke, *Company Law and the European Union: Centralized versus Decentralized Lawmaking*, 31 Int'l Law. 961 (1997).

40. Vagts, *supra* note 2.

41. *Cf.* P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 Duke L.J. 1, 86 (1985).

42. *Cf.* Melvin A. Eisenberg, The Structure of The Corporation: A Legal Analysis (1976); Joel P. Trachtman, *The Theory of the Firm and the International Economic Organization: Toward Comparative Institutional Analysis*, 17 Nw. J. Int'l L. & Bus. 470 (1996/97).

43. *Liggett*, 288 U.S. at 541.

44. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974).

45. *See* Roberta Romano, *State Competition for Corporate Charters*, *in* Foundations of Corporate Law (Roberta Romano ed., 1993).

46. *Id.* at 88.

47. *See* Bernhard Grossfeld, *Language, Writing and the Law*, 5 Euro. Rev. 383 (1997).

48. *See* Marcel Kahan, *Paramount or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. Corp. L. 583 (1994); Marcel Kahan & Michael Klausner, *Antitakeover Provisions in Bonds: Bondholder Protection or Management Entrenchment?*, 40 UCLA L. Rev. 931 (1993); Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 Stan. L. Rev. 1539 (1996).

Today, therefore, the claims are more moderate: managers are expected to select a state of incorporation that is "also" favorable to shareholders—whatever that means. Words, words, words—and nobody knows for sure where wishful thinking, self-interest, and pure myth of an "economic analysis of law" (though valuable within limits) is taken for reality. Does life accept our theories? The critique directed against Cary is not as devastating as its promoters tend to believe. The issue is open.

It has to be remembered that "Delaware" triggered a reaction through the federal Securities Laws. The proxy rules under section 14 and the antifraud rules under section 10 of the Security Exchange Act 1934 became the pillars of American corporate governance; "Delaware" probably would not have survived without them. Who would invest in a publicly held Delaware corporation that is not registered with the Securities and Exchange Commission? Delaware just cried for support by an authority outside the sphere of Delawarian interests. Detlev Vagts tells us. "Were it not for such legislation the flight to Delaware—or some even softer jurisdiction—would have prevailed entirely and the protection of the shareholder would have been diminished to the point where investor confidence would be quite inadequate to support a broadly based public market."[49]

2. *Doubts*

The optimistic view upon Delaware is shaded when asking for the chances to escape from Delaware under another law. Are alternatives available? Is there a perfect market for corporate charters, or does Delaware command a dominate market position, even a monopoly? The answer is open. Ehud Kamar sees the market for corporate laws, as imperfectly competitive, not yielding optimal results to shareholders.[50] He argues that the status as the leading incorporation state gives Delaware competitive advantages that are difficult to match by other jurisdictions. According to him, Delaware enhances these advantages by an indeterminate, judge-oriented law that makes application by Delaware courts a necessity and "thus excludes non-Delaware corporations from network benefits."[51] His point is that because of its market power, Delaware's corporation law can be less determinate than is optimal for sure and yet attract corporations.[52] One conclusion, however, is inevitable: Delaware utilizes her market power first in her own interest—the corporation law is a "proprietary product of Delaware"[53] and is handled as such. It is not necessary to refer to public choice—theories.

Putting these arguments in perspective and transferring them to the international level gives them even more power. Within the United States, the overall position of the economy is not at stake; the money stays within the United States. This changes dramatically in a cross-border situation: the money leaves the national realm and there is little hope that it will ever come back. Advantages for one state will not be balanced out in the long run in favor of another state, nor will they be kept within reasonable proportions by a feeling of sitting in the same boat. A common umbrella of constitutional requirements or securities

49. Detlev F. Vagts, *Conflict of Laws*, 18 AM. J. COMP. L. 863, 864 (1970) (book review).

50. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM L. REV. 1908 (1998).

51. *Id.*

52. *Id.* at 1910.

53. *Id.* at 1955.

laws does not exist; there is little chance that national authorities will take into account foreign interests for their own sake.

B. Continental Europe

1. *Traditional View*

So far, the prevailing view in Europe is different. Under the concept of European diversity, the main concern here is to keep competition for corporate charters at bay and to prevent "corporate homes away from home." This position has to do with the existence of sovereign states (not just federal states), language barriers, and different social structures. Within short distance we find other consensual patterns of commonplace exchanges (culture) and, therefore, clearly distinguishable business environments.[54]

This European tradition stands behind the seat theory in most Continental European countries.[55] The theory underlines the public functions of corporate actors and corporate governance; it stresses the importance of corporate law for a balanced economic and political structure of the national cultures.[56] Therefore, the theory requires that firms have their principal place of business (real seat) in the country of incorporation. Firms incorporated outside the "seat" state will not be recognized as legal entities and will not be granted the privilege of limited liability. Thus, the consequences of a wrong "incorporation" are very harsh—making the seat theory a powerful instrument of national corporate governance and preserving the stringencies of the corporation laws. In the *Daily Mail* case, the European Court of Justice upheld the theory in view of the current state of the Community law—as long as the rule is reasonable and necessary to protect legitimate interests of Member States. The Court went straight into the time-honored "nature" of a corporation: in that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation that determines their incorporation and functioning.[57] The final answer, however, had technical underpinnings:

> Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the member-States with a view so securing inter alia the retention of legal personality in the event of transfer of the registered office of companies from one country to another. No convention in this area has yet come into force.[58]

2. *Doubts*

But the seat theory has its flaws. It makes it difficult, if not impossible, to move corporate headquarters from one country into another without liquidation and re-incorporation. Quite understandably, therefore, it is controversial whether the *Daily Mail* decision still

54. *See* Michael J. Ulmer, Harmonisierungsschranken Des Aktienrechts (1998).

55. *See* Ebke, *supra* note 39, at 966.

56. *See* Ross Grantham, *The Doctrinal Basis of the Rights for Company Shareholders*, 57 Cambridge L.J. 554 (1998); *see also* James A. Fanto, *The Role of Corporate Law in French Corporate Governance*, 31 Cornell Int'l L. J. 31 (1998); Alfred Koller, *Bemerkungen*, AJP/PJA, at 95 (1997); Michael Becker, Verwaltungskontrolle Durch Gesellschafterrechte (1997).

57. Case 81/87, Regina v. H.M. Treasury and Commissioners of Inland Review *ex parte* Daily Mail and General Trust plc., [1999] 2 C.M.L.R. 551 [hereinafter *Daily Mail*]; *see also* Case C-221/89, Regina v. Secretary of State for Transport *ex parte* Factortame, [1991] 3 C.M.L.R. 589.

58. *Daily Mail*, *supra* note 57.

stands. Doubts are nurtured by the recent *Centros* decision of the European Court of Justice.[59] The case came before the Court from Denmark.[60] Denmark follows the Nordic registration theory, under which the decisive connecting factor is the company's country of registration. Under Danish law, registration is compulsory for public and private limited companies. In this context the question arose whether and to what extent the Danish rules of required minimum capital and employee representation could be circumvented by using English private limited companies.

The facts of the case are as follows: "Centros Limited," a company registered in England with a share capital of £100, had been purchased by a Danish couple. Both became members of the board of directors though they had no connections with England nor had they ever attended a company meeting there. The address of the company is that of a friend who also allows other companies to use his address for a fee. A witness had stated, "it is easier to find £100 than Dkr. 200.000"[61] (the minimal capital amount under Danish law). The company then filed an application for the registration of a branch with the Danish registration authority. This authority asked where the company carried on its principal business and where its management was located. As such statement was not made registration was refused.

On appeal, the Danish Supreme Court referred the case to the European Court of Justice for a preliminary ruling pursuant to article 177 of the EC Treaty. The Court asked the following questions:

> Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 58 and 56 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with a company capital of £100 (approximately Dkr. 1000) and established under the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying in company capital of not less than Dkr. 200.000 (at present Dkr. 125.000)?[62]

The European Court of Justice held that Denmark had violated articles 52 and 58 of the EC Treaty—provoking a flood of articles on the vitality of the seat theory. As the Court did not mention the *Daily Mail* decision, it seems to appear that "recognition" was not in point, corporations remain "creatures of national law," and the national law "determines

59. Case C-212/97, Centros Ltd. v. Erthvers-og Selskabbsstyrelsen, [1999] 2 C.M.L.R. 551 (1999); *see* Werner F. Ebke, *Das Schicksal der Sitztheorie nach dem Centros-Urteil des EuGH*, 11 JURISTENZEITUNG (JZ) 656 (1999); Robert Freitag, *Der Wettbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht*, 9 EUROPAEISCHE ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (EuZW) 267 (1999); Stefan Leible, *Note*, 7 NEUE ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (EuZW) 267 (1999); Stefan Leible, *Note*, 7 NEUE ZEITSCHRIFT FUER GESELLSCHAFTSRECHT (NZG) 300 (1999); Guenter H. Roth, *Gruendungstheorie: Ist der Damm gebrochen?*, 21 ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (ZIP) 861 (1999); Peter Ulmer, *Schutzinstrumente gegen die Gefahren aus der Geschaeftstaetigkeit inlaendischer Zweigniederlassungen von Kapitalgesellchaften mit fiktivem Auslandssitz*, 11 JURISTENZEITUNG (JZ) 662 (1999); and Erik Werlauff, *Auslaendische Gesellschaft fuer inlaendische Aktivitaet*, 21 ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (ZIP) 867 (1999).

60. *See* Peter Krueger Anderse & Karsten Engsig Soerer, *Free Movement of Companies from a Nordic Perspective*, 6 MAASTRICHT J. EUR. & COMP. L. 47, 59 (1999).

61. *See Centros Ltd.*, [1999] 2 C.M.L.R. 551.

62. *See id.*

their incorporation and functioning." But the issue is awaiting clarification by future decisions of the European Court of Justice.

C. Prospects

It looks as if "Delaware" is difficult to transfer on the international arena. Delaware is part of a federal system with unifying and traditional factors with which it interacts. The laxity of Delaware law is partly offset by very severe procedural rules. Derivative actions, class actions, punitive damages,[63] contingency fees, strike suits, pretrial discovery, and extraterritorial reach of jurisdiction are probably the more important names of the game. These procedural devices are often missing in other countries. As already mentioned, it can be argued that "Delaware" would not have survived without the support from the federal securities laws. As indicated by Detlev Vagts, this "genius" of American corporation law set the frame within which Delaware could operate and on which the markets could rely—even more than on Delaware.[64] The federal securities laws kept Delaware on a level of trustworthiness. Who would buy shares in a Delaware corporation not registered with the Securities and Exchange Commission?[65] The internal position of Delaware can also be explained by the fact that there is a common language link and, thus, no problems of translation (we are not "lost" in translation). All this changes drastically with cross-border activities, and with the meeting of different cultural experiences and hopes.[66] The old question then comes up again: "Can the Island of Tobago pass a law to bind the rights of the whole world?"[67]

But the problem is not Delaware's alone. The seat theory runs into the problems with the virtual reality. Where is the virtual center of gravity? Can it be geographically delineated around a seat concept? Where are the corporate "brains" when decisions are taken in Internet conferences, when in a decentralized global world various headquarters are bound together and interact with each other over the Internet? The Daimler/Chrysler merger created two headquarters, one in Stuttgart and one in Dearborn—barely managing to stay under German law by giving Germany a slight preponderance.[68] Transnational corporations set up networks that make them (equally?) present everywhere. They are no more present in Delaware or in the country of their seat than anywhere else. Do these geographical links give any legitimacy to the control asserted? Are all countries "Delawares" or "Trobriand Islands" only differing in the ability to extend their rules by shear power or by appeal to the strongest economic actors (*pax americana?*). Are geographically centered rules still up to date in a world of shareholder value? Are the geographical words just ghosts from the past, magical illusions hiding the moving forces in a global network? We meet the limits of geography; do we ever reach the end of geography?

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63. *See* Bernhard Grossfeld, Die Privatstrafe (1961); Richard E. Speidel, *Punitive Damages and the Public Interest Model of Securities Arbitration: A Response to Professor Stipanowich*, 92 Nw. U.L. Rev. 99 (1997); and Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 Nw. U.L. Rev. 99 (1997).

64. Vagts, *supra* note 2.

65. *See* Romano, *supra* note 45; Geoffrey Miller, *Political Structure and Corporate Governance: Some Points of Contrast Between the United States and England*, 1 Colum. Bus. L. Rev. 51, 70 (1998).

66. *See* Bernhard Grossfeld, *Comparative Law as a Comprehensive Approach*, 1 Richmond J. Int'l L. & Politics 1 (1999).

67. Buchanan v. Rucker, 103 Eng. Rep. 546, 547 (1808) (Lord Ellenborough, C.J.).

68. *See* Bernhard Grossfeld, *Brueckenbauer*, *in* Gedaechtnisschrift Alexander Luederitz (forthcoming 2000).

The present rules approach transnational corporations from their parts, not from their network[69]—though concepts of piercing the corporate veil[70] and, in particular, of global accounting concepts—indicate future trends: "The purpose of consolidated statements is to present . . . the results of operations and the financial position of a parent company and its subsidiary essentially as if the group were a single company with one or more branches and divisions."[71]

But do we have network propositions elsewhere? An answer may be given by shareholder activism—in particular through American investment funds—that aims at global corporate governance standards.[72] But that might be regarded as cultural hegemony and might provoke unpredictable reactions or escape routes.[73] There is little chance that a global economy will accept "Delawarization" or a focus on shareholder value without concessions to local stakeholders.[74] Just consider the different views on the question of whether directors may or may not have to consider the effects on constituents other than shareholders, for example, labor as under the German codetermination concept,[75] or the general public.[76]

D. Contract as Salvation?

1. *Delaware as an Example*

Some authors propose contractual agreements for a solution.[77] Indeed, the Delaware approach can be explained as a deal between the state of Delaware and management; could it be a pattern beyond the United States? Certainly, if only one state would structure the corporate governance, conflicts of jurisdictions would not occur. The idea sounds great, looks like a *deus ex machina* but is Delaware a success? Let's take it up again in this context: Roberta Romano argues that shareholders have benefited from Delaware, that this system "for the most part" maximizes shareholder value. But what constitutes "the most part"? Is

69. *See* Damien Considine, *The Real Barriers to Regulation of Corporate Groups*, 3 Asia Pac. L. Rev. 37 (1994).

70. *See* United States v. Bestfood, 524 U.S. 51 (1998); *see also* Broussard v. Meineke Discount Muffler Shop, Inc., 155 F.3d 331 (4th Cir. 1998); Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998); United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997), *cert. granted.* For a wider view, see Phillip I. Blumberg, The Law of Corporate Groups (1985).

71. Accounting Research Bulletin No. 51, Consolidated Financial Statements.

72. *See* Mary E. Kissane, *Global Gadflies: Applications and Implements of U.S.-Style Corporate Governance Abroad*, 17 N.Y.L. Sch. J. Int'l & Comp. L. 621 (1997).

73. *See* Thomas J. Andre, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 Tul. L. Rev. 69 (1998).

74. Joseph Auerbach, *Corporate Ethics: An Elusive Euphemism*, 5 Tulsa J. Comp. & Int'l L. 169, 179 (1997) tells us about a recent recommendation to a corporate board: it "has a responsibility to: 'clearly define its role, considering both its legal responsibilities to shareholders and the needs of other constituencies, provided shareholders are not disadvantaged.' " *Id.*

75. *See* Jean du Plessis, *Some Thoughts on the German System of Supervisory Codetermination by Employees, in* Festschrift fuer Bernhard Grossfeld 875 (Ulrich Huebner & Werner F. Ebke eds., 1999); Bernhard Grossfeld & Werner Ebke, *Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe*, 26 Am. J. Comp. L. 397 (1978); Bernd Singhoff & Oliver Seiler, *Shareholder Participation in Corporate Decisionmaking under German Law: A Comparative Analysis*, 24 Brook. J. Int'l L. 493 (1998). For a general overview, see Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 Yale L.J. 1927 (1993).

76. *See* Richard M. Buxbaum, *Corporate Legitimacy, Economic Theory, and Legal Doctrine*, 45 Ohio St. L.J. 515 (1984).

77. *See* Roberta Romano, The Genius of American Corporate Law (1993); Miller, *supra* note 65, at 70.

there statistical evidence? The language pretends a mathematical precision that does not exist in economics. Game theory and comparative law[78] have successfully attacked this concept. The myth of mathematics is even faster withering away than the myth of law and economics as a comprehensive approach.[79]

2. *Doubts*

Given the deficiencies of "Delaware," the evidence for the social superiority of this concept stands out. As we have seen, other authors express grave doubts and hint to the fact that stock prices might not accurately reflect the corporation's value due to slack.[80] Also, management can use internally generated funds and can thus avoid the equity market as a message board.[81] To sum up: there is no doubt that many corporations are "managerial satrapies,"[82] and management may have even captured the law-making and law-applying institutions.[83] It is now quite clear. Individual actions by mortal shareholders can never challenge the power of immortal structures and of their masserts. The power of immortality of interests and compound interests can only be kept at bay by other immortal powers (investment funds) or by statistically relevant social movements (stock markets). Other actors are open to influence of management in the long run. As the adage goes, "Money has a very small head and will pierce or circumvent every wall." Confronted with such powers, there is also little hope from the legal profession. Corporate attorneys seldom challenge managers that might have been acting against the interests of the corporation and its shareholders; the going perception is that corporate attorneys should only serve managers.[84] What would happen when the stringent procedural and federal environment with its countervailing effect on laxity are exchanged against an enabling bargaining atmosphere? What is one to expect if another liberal model would be put on top of an already existing liberal model. Could that result in too much liberality—liberal for whom? Can the interactions between two liberal models be kept under control; are they sufficiently transparent even for the small guy? The questions indicate the answer: No!

IV. Securities Laws

A. American Federal Law

Securities laws are an American invention, and stand for the genius of the American corporation law,[85] or for the side of state corporation laws given the vagaries of Delaware —whatever view we prefer.[86] Thus, the United States was the original basis of operation

78. *See* Grossfeld, *supra* note 66.

79. *See id.*

80. *See* Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 Mich. L. Rev. 613, 678 (1987).

81. *See id.*

82. William H. Simon, *What Difference Does It Make Whether Corporate Managers Have Public Responsibilities*, 50 Wash. & Lee L. Rev. 1697 (1993).

83. *See* William B. Bratton, *Confronting the Ethical Case Against the Ethical Case for Constituency Rights*, 50 Wash. & Lee L. Rev. 1449, 1460 (1993).

84. *Cf.* Jacobson v. Knepper & Moga, PC, 706 N.E.2d 491 (Ill. 1998); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991). *But see* Lincoln Sav. and Loan Ass'n v. Wall, 743 F. Supp. 901 (D.D.C. 1990).

85. *See* Romano, *supra* note 77. For Germany, see Marcus Lutter, *Gesellschaftsrecht und Kapitlmarkf, in* Festschrift fuer Wolfgang Zoellner 363 (Manfred Lieb et al. eds., 1998).

86. *Cf.* Donald C. Langevoort, *The Epistomology of Corporate-Securities Lawyering: Beliefs, Biases and Organized Behavior*, 63 Brook. L. Rev. 629 (1997).

for securities laws, and soon extraterritoriality again became the name of the game! Here, the loss of distance over the Internet has changed the picture dramatically. The distinction between national and international transactions withers away.[87] Transactions over the Internet are difficult to locate and might have worldwide repercussions. Securities laws cannot be defined anymore by concerts of territoriality. Following global markets, securities laws reach international dimensions.[88]

The application of American securities laws met the new challenges with appropriate speed. Originally, protection against conduct occurring outside the United States was only granted when the conduct had an effect on the American securities market or on American investors.[89] A second avenue extended the American securities laws to acts and omissions within the United States whose impact is felt outside the United States,[90] thus granting the *pax americana* to international investors. But the protection is still limited. The conduct within the United States must form "a substantial part of the alleged fraud" and must be "material to its success."[91] The application in a given case is bound to American interests. It is governed by the expectation of reciprocity and by the desire to elevate the standard of conduct in securities transactions in the United States. The purpose is to encourage American citizens to behave responsibly and to prevent the development of relaxed standards that might spill over to American securities transactions.[92] But the concrete answer is "largely a policy decision"—and this limits the rule's international application and reliability.[93]

B. International Organization of Securities Commissions

The present limits for globally efficient regulations on global markets without distance cry for cooperation—and this is tried within the framework of the International Organization of Securities Commissions (IOSCO). It is a prime example for the fact that international cooperation proceeds apace in the securities field, and is blossoming among the world's regulators. Small wonder. Countries with lax regulatory regimes may damage the soundness and safety of financial markets with potentially catastrophic consequences worldwide.

IOSCO is an intergovernmental substate organization with a special focus on securities regulation.[94] It is constituted by a private bill of the Quebec National Assembly and now comprises 152 members of different status from ninety-one countries. IOSCO assembles

87. *See* A.S. Goldmen & Co. v. New Jersey Bureau of Sec., 163 F.2d 780 (3d Cir. 1999); *cf.* Amir N. Licht, *Games Commissions Play: 2 × 2 Games of International Securities Regulation*, 24 Yale J. Int'l L. 61 (1999).

88. *See* Gunnar Schuster, *Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts*, 26 Law & Pol'y Int'l Bus. 165 (1994).

89. *See* MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 174 (5th Cir. 1990).

90. *See id.*

91. Kauthar SDN BHD v. Sternberg, 149 F.3d 659 (7th Cir. 1990). *But see* Paul Rogers, *A Comment on the Extraterritorial Application of American Law in the 1990's*, *in* Festschrift fuer Bernhard Grossfeld, *supra* note 75, at 901; Michael Wallace Gordon, *United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation*, Wirtschaftspruefer Kammer Mitteilungen 145 (Special Issue June 1997).

92. *See* SEC v. Kasser, 548 F.2d 109 (3rd Cir. 1977).

93. *See* Grunenthat GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983); *see also* Butte Mining PLC v. Smith, 76 F.3d 287 (9th Cir. 1996).

94. *See* Joel P. Trachtman, *Accounting Standards and Trade Disciplines: Irreconcilable Differences?*, 31 J. World Trade 63, 76 (1997).

comparative information and issues recommendations for the harmonization and mutual recognition of rules on disclosure and accountancy, the regulation of secondary markets, and the regulation of market intermediaries. It aspires to achieve its goals through consensus and cannot promulgate laws or treaties.[95] IOSCO works cooperatively with the International Accounting Standard Committee (IASC), which issues the International Accounting Standards (IAS).[96]

In its publication entitled "Objectives and Principles of Securities Regulation," IOSCO set forth thirty "principles of securities regulation,"[97] based on three objectives: protection of investors; ensurance of fair, efficient, and transparent markets; and reduction of systemic risk. Key components are accounting and auditing standards, rules against the abuse of insider information, and protection against the financial failure of market intermediaries.

C. Internet: Trying to Board a Moving Bus[98]

1. *National Regulators*

IOSCO has entered the virtual world with its document *Securities Activity on the Internet*, referring to the Internet's "unprecedented immediacy, flexibility and interactivity," challenging "traditional notions of jurisdiction and territoriality."[99] The network is ever-present, recognizing neither geographic nor state borders. The loss of distance makes borders disappear, endangers sovereign activities based on the concept of control over territory, and throws even the concept of sovereignty itself into doubt. According to IOSCO, however, this is not the end of geography: "Although Internet communications are not easily confined to within national borders, national regulators remain responsible for protecting investors in their jurisdictions. Each regulator must determine generally under what circumstances Internet securities transactions, wherever originating, may be made available to investors in their jurisdictions."[100]

Regulators are, however, asked to provide guidance on the circumstances under which they will exercise regulatory authority. They may impose regulatory requirements over Internet activities that occur (what does this mean?) within their jurisdiction or if offshore activities, in fact, have a significant effect upon residents or markets within their jurisdiction.

2. *Factors to Be Considered*

In doing so, regulators should examine the following factors (neither determinative nor exclusive) in deciding whether to assert authority:

- Is the information clearly targeted to residents within the jurisdiction? Indications of targeting may be local distribution networks, concurrent advertising or publicity through other media in the jurisdiction, prices in local currency or communications in

95. *See* David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 Tex. Int'l L.J. 281 (1998).

96. *See infra* Part IV.D.

97. International Organization of Securities Commissions, *Objectives and Principles of Securities Regulation*, http://www.iosco.org/docs-public1198-objectives-document02.html (last visited Sept. 11, 2000).

98. *See* Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

99. International Organization of Securities Commissions, *Securities Activity on the Internet*, http://www.iosco.org/docs-public/1998-internet-security-document01.html (last visited Sept. 11, 2000).

100. *Id.*

local language (when that currency or language is not commonly used on a global basis—American and Dollars as safe havens? The only ones?);
- Accepting purchases or providing services from or to residents in the jurisdiction unless made under circumstances that exclude a public offering; and
- Use of e-mail or other media that push the information to residents in the jurisdiction.[101]

Factors operating against the assertion of authority may be:

- It is clearly stated to whom an offer is directed;
- The website lists up the jurisdictions in which the author is admitted to securities activities; and
- Reasonable precautions are taken to prevent sales in the jurisdiction. Screening the addresses of persons responding to the Internet offer could be an effective means. An absence of reasonable precautions is indicated by a significant amount of unauthorized sales.[102]

In any event, regulators should take enforcement actions whenever fraudulent or manipulative activities place residents at risk.

3. *Securities and Exchange Commission*

The American Securities and Exchange Commission (SEC) suggests a number of steps to avoid triggering U.S. securities laws.[103] Under the general approach of interpretation, foreign offshore Internet offerors should post meaningful disclaimers on their websites and should "implement measures that are reasonably designed to guard against sales or the provision of [investment] services to U.S. persons."[104] They should not send e-mail or direct other offering-related communications to particular U.S. persons or groups. In the case of simultaneous offshore Internet and U.S. exempt offerings by foreign issuers, these offerors should not use their offshore Internet offerings to solicit investors for their private U.S. offerings. By the same token, U.S. issuers have to take precaution when they make Internet offshore offerings. They should password protect their websites to ensure that only non-U.S. persons may obtain access. Underwriters should always look at the issuer's status to determine what measures may be adequate to avoid targeting the United States.

Practice reacts with provisos like the following:

> Any shares of ABB Ltd. (Switzerland) to be delivered in connection with the Exchange Offers (. . .) will not be registered under the U.S. Securities Act of 1933, as amended (the Securities Act), or under any relevant securities laws of any state of the United States. Accordingly, the shares of ABB Ltd. may not be offered, sold or delivered within the United States except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act and otherwise in accordance with all applicable state securities laws.
>
> The Exchange Offers have not been registered in Canada, Japan, or Australia and are not being made directly or indirectly in Canada, Japan, or Australia. The shares to be issued

101. *See id.*
102. *See id.*
103. *See* Statement of the Commission, 63 Fed. Reg. 14,806 (Mar. 27, 1998).
104. *See id.* at 14,807–08.

> by ABB Ltd. pursuant to the Exchange Offers will not be registered in Canada, Japan, or Australia and may not be offered, directly or indirectly, in Canada, Japan or, Australia.[105]

Words act as a wall against the real cross-border penetration over the Internet. In a virtual world, words occupy the role of geography. Virtuality meets virtuality!

There is, however, reason for optimism. Securities are rather standardized assets to which securities markets assimilate quite fast. The high level of abstraction facilitates common views, as geographical idiosyncrasies normally do not interfere. In addition, the U.S. example has already set the pattern in Europe,[106] in Germany,[107] and elsewhere, creating a common frame of reference.

4. *Personal Jurisdiction*

So far, there is little experience with jurisdictional problems caused by the Internet. What constitutes a sufficient contact?[108] In *Bensusan Restaurant Corp. v. King*, the court held that a website alone did not fulfill the requirements even of a long-arm statute.[109] The operator of the famous New York jazz club, "The Blue Note," in the heart of Greenwich Village, sued Mr. King, the operator of the "The Blue Note" jazz club in Columbia, Missouri. King marketed his nightclub on a website that could be clicked on in New York. The plaintiff asked for protection for his registered trademark. The court was of the opinion that a website alone did not constitute a presence in New York.[110]

The decision, however, is restricted to a very particular situation that deserves mention. The court realized that "attempting to apply established trademark law in the fast-developing world of the Internet is somewhat like trying to board a moving bus."[111] Therefore, the court emphasized the local setting from the outset:

> Columbia, Missouri, is a small to medium size city far distant both physically and substantively from Manhattan. It is principally a white-collar community, hosting among other institutions Stephens College, Columbia College and the University of Missouri. It would appear to be an ideal location for a small cabaret featuring live entertainment, and King, a Columbia resident, undoubtedly found this to be so.[112]

King originally added a disclaimer that his CyberSpot should not be confused with "one of the world's finest jazz clubs, the Blue Note" located in Greenwich Village.[113] But he had added a hyperlink that could be used to connect a reader's computer to a website maintained by Bensusan. On Bensusan's objections, King removed the hyperlink and substituted the following disclaimer:

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105. ABB GROUP, PROSPECTUS, INTRODUCING THE ABB LTD. SINGLE-CLASS SHARE. EXCHANGE OFFER BY ABB LTD TO THE SHAREHOLDERS OF ABB AB AND ABB AG. (1999).

106. *See* Council Directive 89/592, Coordinating Regulations on Insider Dealing, 1989 O.J. (L 334) 30.

107. *See* Peter M. Memminger, *The New German Insider Law: Introduction and Discussion in Relation to the U.S. Securities Law*, 11 FLA. J. INT'L L. 189 (1996).

108. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

109. *See Bensusan Rest. Corp.*, 126 F.3d at 25.

110. For the question of whether a domain on a website violates a trademark, see Lockheed Martin Corp. v. Network Solutions, Inc., 175 F.R.D. 640 (C.D. Cal. 1997). The court regards websites mainly as addresses, not as trademarks.

111. *Bensusan Rest. Corp.*, 126 F.3d at 27.

112. *See id.* at 26.

113. *Id.* at 27.

> The Blue Note, Columbia, Missouri should not be confused in any way, shape, or form with Blue Note Records or the jazz club, Blue Note, located in New York. The CyberSpot is created to provide information for Columbia, Missouri area individuals only, any other assumptions are purely coincidental.[114]

From this introduction to the facts, the result followed. There were no substantial revenues derived from interstate commerce, a requirement that "is intended to exclude non-domiciliaries whose business operations are of a local character."[115] "King's 'Blue Note' cafe was unquestionably a local operation."[116] The virtual loss of distance was reconstituted by a virtual distance created through a wall of words! Can we trust them?[117] Even virtual signs have real impacts and cannot be erased by virtuality. Power of the Internet!

D. Contract as Salvation?

The advocates of contract as salvation also advertise this solution for international securities transactions.[118] Foreign issuers selling shares in the United States could then opt out of federal securities laws and choose those of another nation. They may choose their country of incorporation or another U.S. state to govern their transactions in the United States. By the same token, U.S. securities laws would not apply to transactions by U.S. investors abroad in the shares of firms that opted for a non-U.S. securities domicile. Consequently, U.S. law would apply only to corporations affirmatively choosing to be governed by U.S. law, whether they are U.S.- or non-U.S.-based firms.[119] And what happens if they do not?

Here again, the proposal gets another turn when it comes to the international scenario as all corporate law questions receive a more intensive color in cross-border transactions. As we have seen,[120] the balancing-out effect of internal transactions is missing and puts limits on international liberality. What is lost is normally lost forever.

In addition, securities laws are modeled along particular corporation's laws, not only by language, but also by spirit. A normative mix of rules from different jurisdictions might amount to a new form of lottery when the concepts cannot be easily matched. The loss of transparency for the small investor is apparent and increases his transaction costs for finding out far beyond any national transaction. Are there lawyers around that can tell him how it fits together? Consider only mastering two or three languages—given the fact that words cannot be translated, that we are lost in translation, and that experiences are not shared.[121]

V. Accounting[122]

A. Centerplace

Given the loss of distance, national rules of accounting lose their "sovereign" shelter and—even more important—change their functions. In particular, in Europe they were

114. *Id.*

115. *Id.* at 29 (internal citations omitted).

116. *See id.*

117. *Cf.* Bernhard Grossfeld & Markus Huelper, *Analphabetismus in Zivilrecht*, 9 Juristenzeitung 430 (1999).

118. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L.J. 2359 (1998).

119. *See id.* at 2362.

120. *See supra* Part IV.C.2.

121. *See* Grossfeld, *supra* note 66 and accompanying text.

122. *See* Bernhard Grossfeld, Bilanzrecht (2d ed. 1997); Price Waterhouse Coopers, Understanding IAS: Analysis and Interpretation of International Accounting Standards (1999).

mostly regarded as constituting an important part of microeconomics; they were treated as being important for the presentation of individual firms to banks and other individual creditors. Their aspect of marketing the corporation on financial markets was neglected: on isolated national markets it was sufficient to rely on the professional knowledge of an elite national circle. This has changed dramatically. Global markets do not rely on national elites, but rather on the compound power of a huge number of anonymous actors moving their money around the world at the tip of their fingers. Given the strength of this global market, firms must be able to attract part of this freewheeling capital at the lowest possible interest rates. Because of the extraordinary, magical power of interest and compound interest over time (seventy-two divided by the interest rate roughly shows the numbers of years in which debt doubles[123]), a firm cannot survive against more cheaply financed competitors.

That is why accounting, too, has changed its character. It has become a macroeconomic instrument of the greatest proportion acting speedily and brutally. Rules of accounting channel the flow of money around the world, directing capital towards the most beautiful and most trustworthy bidder and withdrawing it from the less fortunate. Rules of accounting are the most important money agents. Lawyers, traditionally not trained in market concepts, tend to neglect these dynamic aspects of accounting. But the closeness to money and to money transactions puts accounting into the centerplace of a global economy giving accountants a competitive edge over lawyers—a growing matter of concern for the legal profession. Two semiotic information systems (the Internet and accounting) join forces and support each other in geometrical proportions. They are both information products and pure know-how—energy. Their very essence is not physical appearance but the information that they convey across all national borders. Sovereignty based on control over know-how and on the power to channel it through law has no chance anymore; the censorship exerted by keeping rules of accounting within the national frame in favor of the national profession (the happy few) is broken by an international communication society for which lawyers (with their traditionally domestic instincts) are badly prepared. Working together, these new energy bundles drive to new proportions the ability of money to whirl from one place to another, to move from purpose to purpose.[124] Accounting rules even create "acquisition currencies." A corporation that wants to swap shares in the United States, for instance, has first to create its share-currency on Wall Street by using the Generally Accepted Accounting Principles (GAAP).

B. Diversity

Unfortunately, accounting rules continue to vary from jurisdiction to jurisdiction,[125] due to history and path-dependency.[126] The present state of things is well expressed in a statement of the International Accounting Standards Board:[127]

123. Assume that a particular investment earns ten percent a year. The investment will then increase in value by 2.5 times after ten years, almost seven times after twenty years, over seventeen times after thirty years, and by forty-five times after forty years. *See* Note, *Five Strategies to Increase Retirement Savings*, Participant 8, 9 (May 1999).

124. *See* O'Brien, *supra* note 5, at 7.

125. *See* Bernhard Grossfeld, *Comparative Accounting*, 28 Tex. Int'l L.J. 235 (1993).

126. *See* Masao Kishida, *Japanese Legal Accounting System*, in Festschrift fuer Bernhard Grossfeld, supra note 75, at 569.

127. International Accounting Standards Committee, *IAS 32: Financial Instruments: Disclosure and Presentation*, *available at* http://www.iasc.org.uk/ (last visited Sept. 11, 2000).

> Financial statements are prepared and presented for external users by many enterprises around the world. Although such financial statements may appear similar from country to country, there are differences, which have probably been caused by a variety of social, economic, and legal circumstances and by different countries having in mind the needs of different users of financial statements when setting national requirements.
>
> These different circumstances have led to the use of a variety of definitions of the elements of financial statements; that is: for example, assets, liabilities, equity, income and expenses. They have also resulted in the use of different criteria for the recognition of items in the financial statements and in a preference for different bases of measurement. The scope of the financial statements and the disclosures made in them have also been affected.[128]

C. Generally Accepted Accounting Principles

1. *Character*

Given the fact that New York and Wall Street are the financial centers of the world, the GAAP—maintained by the Accounting Standards Board, a private professional body under the loose supervision of the SEC—could become a kind of world standard.[129] They are the only access road to Wall Street for firms that want to be traded there. The desire is motivated by three factors: trading in a wider area might increase the value of their shares; it enhances their name recognition in the United States and serves as a marketing device for products; and it creates a new currency as already mentioned. This latter aspect is often decisive.

But the GAAP are not easily used outside their birthplace. The limited exportability is part of their very nature, which the Supreme Court of California described as follows:

> The GAAP are an amalgam of statements issued by the AICPA through the successive groups it has established to promulgate accounting principles: the Committee on Accounting Procedure, the Accounting Principles Board, and the Financial Accounting Standards Board. Like GAAS, GAAP include broad statements of accounting principles amounting to aspirational norms as well as more specific guidelines and illustrations. The lack of an official compilation allows for some debate over whether particular announcements are encompassed within GAAP. One standard text purporting to comprehensively restate GAAP includes 90 major sections and more than 500 pages.[130]

Add to this their flexibility, their undeterminacy, and we arrive at a very complex situation. It is this complexity that gives the American profession a virtual monopoly on interpretation and application. Claus Luttermann calls the GAAP a "patchwork"[131] and refers to the "definition mess,"[132] receiving their meaning largely from the unwritten American environment: "Generally accepted accounting principles are conventional—that is, they become generally accepted by agreement (often tacit agreement) rather than by formal derivation from a set of postulates or basic concepts. The principles have developed on the basis of experience, reason, custom, usage, and, to a significant extent, practical necessity."[133] The difference to European traditions of interpretation is apparent.

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128. *Id.* For the history, see Grossfeld, *supra* note 125.
129. *See* Jens Wuestemann, Generally Accepted Accounting Principles (1999).
130. Bily v. Arthur Young & Co., 834 P.2d 745, 750–51 (Cal. 1992).
131. Claus Luttermann, Unternehmen, Kapital und Genussrechte 407 (1998).
132. *Id.* at 407 n.228.
133. Generally Accepted Accounting Principles, APB Statement No. 4, § 139 (1972).

2. *Doubts*

We run into problems similar to those with "Delaware"—but on the international level—from the very beginning and without the balancing factors that persist in a national setting. The flexibility and the perplexing patchwork compilation of the GAAP "guaranty" and "indeterminacy" even beyond "Delaware;" the language advantage strengthens the position of the American happy few. This gives the United States a virtual monopoly in the interpretation, not to be matched by other countries that will retain a junior status. This stirs up bad memories as they are, for instance, felt in India. There it is said that the indeterminacy of the Common Law was deadly for the colonized, but a resource for the Empire. Will there be a new Empire in accounting run by a small national group? Career prospects for native English speakers, for people trained in the United States, and for law or business schools there look brilliant. There is also the risk that accountants' liability will be governed by U.S.-influenced standards, which do not necessarily take into account the "offshore view of the world" and the "what is done and what is not done" abroad. The "client-controlled environment[s]" of the audits[134] may be dramatically different. American courts will find ways to exert jurisdiction,[135]—a sufficient genuine link could be the apparent Americanness and the greater experience with rules from the United States.[136]

D. INTERNATIONAL ACCOUNTING STANDARDS

1. *Character*

The IAS are an attempt to overcome these shortcomings and to prevent an American dominance of the profession.[137] They are the work of the IASC, an independent, private-sector body in London, England that was formed in 1973 by professional accountancy bodies from the Western world. It now includes all the members of the International Federation of Accountants (IFAC) from ninety-one countries. The aim is to achieve uniformity in accounting principles for financial reporting around the world.[138] Its objectives are:

> (a) to formulate and publish in the public interest accounting standards to be observed in the presentation of financial statements and to promote their worldwide acceptance and observance, and (b) to work generally for the improvement and harmonization of regulations, accounting standards, and procedures relating to the presentation of financial statements.[139]

The IOSCO[140] is looking to the IASC to provide mutually acceptable IAS for use in multi-national securities offerings and other international offerings. The approved text is published in English. Members may issue translations in the languages of their country, but

135. *Cf.* First Am. Corp. v. Price Waterhouse, LLP, 988 F. Supp. 353 (S.D.N.Y. 1997); First Am. Corp. v. Price Waterhouse, LLP, 154 F.3d 16 (2d Cir. 1998); Andreas F. Lowenfeld, *National Jurisdiction and the Multinational Enterprise, in* INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 81 (Andreas F. Lowenfeld ed., 1996); Andreas F. Lowenfeld, *Suing a Multinational Enterprise, in* INTERNATIONAL LITIGATION AND ARBITRATION 202 (Andreas F. Lowenfeld ed., 1993).

134. *Bily*, 843 P.2d at 763.

136. *See* Paul Carrington, *Moths to the Light: The Dubious Attractions of American Law*, in FESTSCHRIFT FUER BERNHARD GROSSFELD, supra note 75, at 129.

137. .See CURRENT STANDARDS, INTERNATIONAL ACCOUNTING STANDARDS (International Accounting Standards Committee 1998).

138. *See* Alexander Bardenz, Von Deutscher zu Internationaler Rechnungslegung-HGB und IAS (1997) (unpublished dissertation, Munster Universitat) (on file with Munster Universitat Library).

139. Trachtman, *supra* note 94, at 78.

140. *See infra* Part D.2.

it must be indicated that it is a translation of the approved text. The work is in progress; there are currently thirty-two international accounting standards. A number of countries already require or allow to present financial standards in accordance with the IAS, for example, section 292a of the German Commercial Code for group accounts if the shares are traded on foreign exchanges.[141]

It is, however, unclear whether the IAS will facilitate access to the U.S. market, as the SEC expressed reservations in view of the fact that the IAS must measure up to the GAAP. The SEC is also concerned about the fact that the interpretation of the IAS might vary from one state to another. Without a centralized authority for definitive interpretation the standards will soon diverge.

2. *European Commission*

The European Commission sees the urgency of the problems and the inherent danger of American dominance and attaches much importance to accounting as a tool for a proper functioning of international markets.[142] It puts its weight behind the IAS, in particular with regard to group accounts. The Commission clearly favors the IAS over the GAAP.[143] The Commission believes that only the IAS produce results, which have a clear prospect of international recognition within a not-too -distant future. It takes a firm stand against the adoption of American standards even as an interim measure. "American standards are developed without any European input. They are designed to satisfy the needs of the American capital market and are not necessarily suitable in a European context."[144]

By the same token, the Commission discourages European enterprises to prepare financial statements on the basis of the GAAP, as it makes it more difficult to come to terms between the IASC and the IOSCO. There is also, quite rightly, concern for job opportunities as already mentioned above. If American standards prevail, the American profession and American-trained accountants will command a considerable competitive advantage, and the Europeans fear "that appetite more than ideals" might dominate the process.[145] The relative strength of financial centers will decide the outcome: Markets make law. Will Wall Street continue to be far ahead of the crowd, or will an alliance of Frankfurt, London, and Paris rise to competitive status? Insofar, geography is not outdated even in, and for, a virtual environment.

E. World Trade Organization

1. *Language Barriers*[146]

Standards of accounting are two different languages and can, therefore, act as trade barriers.[147] The subject of language as a trade barrier has seldom been discussed; though it is

141. *Cf.* Martin Henssler, *Minderheitenschutz im faktischen GmbH-Konzern—Zugleich ein Plaedoyer fuer die Aufwertung des Konzernabschlusses*, *in* Festschrift fuer Wolfgang Zoellner, *supra* note 85, at 203.

142. *Cf.* Case C-234/94, Waltraud Tomberger v. Gebrueder von der Wettern GmbH, 1996 E.C.R. I-3133.

143. *See* Susan Binns, *The EU-Commission's Strategy with Respect to Accounting and Disclosure*, *in* Institut Der Wirtschaftsprüfer, Weltweite Recnungslegung und Prüfung 35 (1998).

144. *Id.* at 36.

145. Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 Am. U. J. Int'l L. & Pol'y 745, 767 (1995).

146. *See* Claus Luttermann, *Dialog der Kulturen: Vergleichendes Handels- und Kapitalmarktrecht im Sprachspiegel*, *in* Festschrift fuer Bernhard Grossfeld, *supra* note 75, at 771.

147. *Cf.* Jack A. Hiller, *Law, Language, Creativity and the Divided Brain: Are We Producing Half-Brained Lawyers?*, *in* Festschrift fuer Bernhard Grossfeld, *supra* note 75, at 365.

of major importance within the European Union. Here, the French language legislation (specifically the Bas-Lauriol Law and the Toubon Law) is the starting point of the discussion.[148]

The arguments begin with the assumption that states are inclined to enact protectionist measures to reassert their regulatory autonomy against cultural invasions, and that such legislation violates the principles of free movement of goods within the European Union. As language is a prime social glue, it is not surprising that governments try to use language as an instrument to protect national, cultural, and economic identities. The impact on economic movements is the stronger as—so far—little attention has been devoted to these effects and, thus, little control is exerted.

A closer look shows that different rules of accounting restrict cross-border trade and services in securities. The New York Stock Exchange, for instance, requires that the companies' accounts follow the GAAP. Thus, shares presented under a different "name" (e.g., IAS) cannot be traded there. By the same token, foreign issuers seeking to enhance their name recognition in the United States lose a very important marketing tool. Thus, different rules of accounting constitute a direct barrier for the free flow of goods.

In addition, diverse accounting standards present a severe obstacle for cross-border services. They affect the activities of at least three industries: accounting, financial and legal services, and stock exchanges. Foreign accounting firms cannot provide competitive services in a domestic accounting system. If at all, they will have to develop additional expertise and to obtain licensing. The same is true for law firms.

2. *The General Agreement on Trade in Services (GATS)*

a. Applicability

Joel P. Trachtman has discussed these problems in the context of the WTO—in particular with regard to services.[149] The WTO aims to "provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes."[150] Of course, the General Agreement (GATT 1994) does not apply to services of any kind, including financial services. It could be argued, however, that a prospectus containing financial statements is a good and that a prospectus, therefore, is covered by GATT and, in particular, by the Agreement on Technical Barriers to Trade (Standards Agreement). But the common understanding seems to be that neither GATT nor the Standards Agreement were intended to govern financial disclosure regulation.[151] In addition, the Standards Agreement (included in Annex 1A to the Final Act) excludes services standards from its coverage; they were thought to be too heterogeneous for the application of general disciplines on standards-setting.[152]

Thus, only GATS is left to scrutinize measures by Member States that affect trade in services. It includes under Article I(2):

148. *See* Stacy Amity Feld, *Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade*, 31 VAND. J. TRANSNAT'L L. 153 (1998).

149. *See* Trachtman, *supra* note 94.

150. General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1125, 1144.

151. *See* Trachtman, *supra* note 94, at 79.

152. *See id.*

- Cross-border trade, where the provider is located in the territory of one member and provides the services into the territory of another member;
- Cross-border trade, where the service consumer travels to the territory of the member in which the service provider is located;
- A service supplier of one member that establishes a commercial presence in the territory of another member; and
- The presence of natural persons of a member to provide services in the territory of another member.[153]

The GATS Annex on Financial Services states explicitly that it "applies to measures affecting the supply of financial services."[154] It sounds like a reasonable interpretation to assume that the regulations for accounting fall under this category.[155]

b. Operating Provisions

Article VI of GATS provides the operating discipline; it covers sectors in which specific commitments have been undertaken and requires reasonable, objective, and impartial administration of all measures of general application. For our purposes, article VI is in point: "Member[s] shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitment in a manner" that is "more burdensome than necessary to ensure the quality of the service" and "could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made."[156] Thus, "proportionality" and "reasonable expectations" have to be discussed. So far the chances for an attack on the GAAP seem to be slim.[157] But the loss of distance and the rise of the IAS may improve the "off-shore" chances.

VI. Bankruptcy[158]

A. Part of Corporate Governance

The emphasis on shareholder value has neglected another crucial component of corporate governance: corporate bankruptcy;[159] both institutions dynamically interact with each other. The feeling for this connection has always been strong in continental Europe, where banks were the driving forces behind the first corporation statutes,[160] and where the rules of accounting were designed to protect banks in their position as prime lenders.[161] It is this marriage between banks and corporations[162] that explains to a large extent the more strin-

153. General Agreement on Trade in Services (GATS), Apr. 15, 1994, 33 I.L.M. 1168, 1169.

154. *Id.* at 1189.

155. *See* Trachtman, *supra* note 94, at 81.

156. GATS, *supra* note 153, at 1173.

157. *See* Trachtman, *supra* note 94, at 96.

158. *See generally* Evan D. Flashen & Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, Tex. Int'l L.J. 587 (1998); Lauren D. Rosenthal,*Rule 10b-5 and Transnational Bankruptcies: Whose Law Should Apply?*, 61 Fordham L. Rev. S321 (1993).

159. *See* David A. Skeel Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 Vand. L. Rev. 1324 (1998).

160. *See* Klaus Hopt, *Ideelle und wirtschaftliche Grundlagen der Aktien-, Bank- und Boersenrechtsentwicklung im 19. Jahrhundert, in* Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert 128 (Helmut Coing & Walter Wilhelm eds., 1980).

161. *See* Grossfeld, *supra* note 125.

162. *See* Skeel, *supra* note 159, at 1383.

gent requirements in European corporation laws and the love for silent (not hidden) reserves in the balance sheets; it also explains the antipathy against "Delaware."

It is also clear that the different theories on when and to what extent to pierce the corporate veil have much to do with the question of whether a single illiquidity can launch an avalanche of liability. Are there bankruptcy rules that work as a bulwark of last resort to stop the avalanche somewhere? Otherwise, the avalanche might destroy vast going-concern values, ruin the whole corporate group, and cause a social disaster with unforeseeable costs to the public—in particular, during an industrial downturn. In this way, liberal or stringent corporate rules, concepts of piercing, and accounting interact with and complement each other.[163] The trend to higher, even to market values, in international accounting will inevitably affect the emergence of corporate reorganization procedures in bankruptcy laws. David A. Skeel makes the point that we can only understand how corporate governance operates when we again learn to understand the complementary relationship between corporate law and corporate bankruptcy.[164] He advocates a new political account of corporate law taking into account that a firm's approach to corporate law "is integrally related to the nature of the corresponding bankruptcy regime,"[165] which he sees as the "crucial missing piece in understanding corporate governance."[166]

The same follows from the internationalization of markets. Growing exposures to risks abroad (often hardly foreseeable) trigger a transfer of national wealth into another country from where it might never come back. Insofar, internal liability and cross-border liability do not stand on equal levels. Also, foreign courts might be tempted to use their long arms for a kind of carpet bagging abroad. Bankruptcy laws have to take care of these differences and temptations. Only through an adaptive evolution may corporate governance patterns stay stable despite the constraints of global markets.

B. International Cooperation

Given these interdependencies, a real international bankruptcy law has few, if any, chances although the need for it is particularly urgent. The insolvency or the reorganization of a transnational corporation presents some of the most vexing situations. All of a sudden the unitary structure of the corporation in financial difficulties is compartmentalized. Unconnected national authorities all deal with often overlapping parts, and they follow a variety of separate and sometimes conflicting interests.

In the event of a financial failure of a transnational corporation, the "rosy" concept of globalization turns upside down changing the picture dramatically. The "relocalization" of administration to various jurisdictions impedes normal corporate transactions, and might bring them to a dramatic stop. A myriad conflict of law issues arise. "Indeed, an outside observer of the current international regime for insolvencies might quickly conclude that is was structured to promote, rather than prevent, financial failures and liquidations."[167]

163. *See* Bernhard Grossfeld, Aktiengesellschaft, Unternehmenskonzentration und Kleinaktionaer (1968).

164. Skeel, *supra* note 161, at 1324.

165. *Id.* at 1329.

166. *Id.* at 1350.

167. Bruce Leonard, *Managing Default by a Multinational Venture: Cooperation in Cross-Border Insolvencies*, 33 Tex. Int'l L.J. 543 (1998).

Historically, governments have shown little attention to improve the situation. Today the best prospect seems to be the cooperation among national states. This demands globally concerted actions.[168]

C. Cases

In *Maxwell Communication Corp. v. Société Generale*,[169] the Federal Court of Appeals pleaded for a national restraint and held that the principles of international comity counseled against applying the Bankruptcy Code's preference avoidance provisions internationally. But *In re Simon*[170] is a perfect example for the continuing complexities of the present situation. Hong Kong and Shanghai Banking Corp. is an international banking company incorporated in Hong Kong. It had extended a loan to Odyssey International Holdings, Ltd. Odyssey is an international company incorporated in the British Virgin Islands; it maintains offices in Hong Kong. Simon was Odyssey' s major shareholder and lived in and operated his company from Hong Kong; he guaranteed the loan. The guarantee was to be enforced under the law of Hong Kong and the jurisdiction of the courts in Hong Kong was agreed upon.

Simon then traveled to the United States and filed a personal bankruptcy under Chapter 7 of the U.S. Bankruptcy Code. Hong Kong and Shanghai participated in the proceedings. In his bankruptcy schedules Simon listed the guarantee as an obligation. The bankruptcy court granted him a discharge of all debts and issued the following injunction: "All creditors whose debts are discharged by this order . . . are enjoined from instituting or continuing any action or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor."[171]

Unconvinced, Hong Kong and Shanghai sought a declaratory judgment from the bankruptcy court that the discharge and the injunction were not enforceable outside the United States, and that Hong Kong and Shanghai could commence collection proceedings in Hong Kong. The bankruptcy court dismissed the complaint and the Federal Court of Appeals affirmed:

> Thus, under the bankruptcy code, the bankruptcy court must consider the status and progress of other nations' insolvency proceedings in determining how to manage domestic bankruptcies. In most cases the court will defer to where the "center of gravity" of multiple proceedings exists, if one can be ascertained. However, courts may also proceed jointly with a foreign court . . . or may choose to exercise its power to the full extent of its jurisdiction in an appropriate case.[172]

The court distinguished *Maxwell* as follows:

> *Maxwell* involved an international insolvency jointly managed in the United States and Great Britain. A true conflict existed between the preference law of Great Britain and the United States which would have produced a different result depending on which law applied. Because

168. *See id.*

169. Maxwell Comm. Corp. v. Société Generale, 93 F.3d 1036, 1050 (2d Cir. 1996); *see* Jay Lawrence Westbrook, *The Lessons of Maxwell Communications*, 64 Fordham L. Rev. 2531 (1996).

170. *In re* Simon, 153 F.3d 991 (9th Cir. 1998), *cert. denied*, Hong Kong and Shanghai Banking Corp. v. Simon, 119 S. Ct. 1032 (1999).

171. *Id.* at 994.

172. *Id.* at 999.

the pre-petition transactions occurred solely in Great Britain, the *Maxwell* court appropriately exercised its discretion to defer in the interest of international Comity.

By contrast, this case does not involve competing bankruptcy proceedings; indeed, there is no proceeding pending in Hong Kong. The sole, plenary insolvency proceeding was initiated in the United States without objection and with the participation of the appellant. Hong Kong–Shanghai cannot point to a single conflict which exists between Hong Kong and the United States law on the issue in question. In fact, the section 524 discharge injunction does not apply to the Hong Kong courts at all, but only to the creditor who enjoyed the benefits of participating in the United States bankruptcy.[173]

In *In re Simon*, the court of appeals held that the Bankruptcy Code provides for a flexible approach in international insolvencies. The courts have to take into account foreign proceedings and, as a matter of last resort, have to apply the American law extraterritorially in the interest of creditors and the debtor. But notwithstanding all the talk about comity and cooperation, the hard core lies elsewhere and pretends to be geographic (in words!):

The court's exercise of "custody" over the debtor's property, via its exercise of in rem jurisdiction, essentially creates a fiction that the property—regardless of actual location—is legally located within the jurisdictional boundaries of the district in which the court sits. . . . This includes property outside the territorial jurisdiction of the United States.[174]

Therefore, Judge Hall concurred stating: "Congressional intent may be less than clear, but it is clear that bankruptcy estate property is located within the bankruptcy court's jurisdiction."[175]

He did not see "that territoriality is implicated in this case."[176] Fiction over fact—the beginning or the end of geography? What does "geography" mean?

D. Proposals

Limited legislative attempts in the United States, the United Kingdom, and Australia[177] into the area of cooperation have only been used infrequently. More successful were attempts by the International Bar Association with its Cross-Border Insolvency Concordat in 1996. It refers to cooperation and coordination and suggests the harmonization of conflicting interest in a spirit of comity.

The Concordat met its practical test in the *Everfresh Beverages* case.[178] A Delaware corporation with its headquarters in Chicago went bankrupt. It had operations in the United States and Canada. The initiation of a reorganization proceeding in the United States seemed to be meaningful only when the Canadian courts were willing to recognize it. Otherwise, creditors involved in the Canadian portion of the business could have attacked the structure put in place in the United States, notwithstanding the worldwide application of the U.S. Bankruptcy Code.[179] Not being subject to the jurisdiction of the American court, these creditors could have seized the company's assets in Canada. The solution found was

173. *Id.*
174. *Id.* at 996.
175. *Id.* at 999.
176. *Id.*
177. *See* Leonard, *supra* note 167.
178. *In re* Everfresh Beverages, Inc., 238 B.R. 558 (Bankr. S.D.N.Y. 1999).
179. 11 U.S.C. § 541 (1994).

a parallel reorganization procedure in Canada. The American judge and his Canadian colleague both directed the company and its creditors to coordinate the bankruptcy proceedings in the other country.[180] Both judges approved the Cross-Border Insolvency Protocol on the same day.

E. Comprehensive Legislative Attempts[181]

Various attempts have been made to arrive at transnational legislative solutions. The European Union Convention on Insolvency Proceedings[182] encouraged wider-reaching solutions.[183] Very significant is the UNCITRAL Model Law on Cross-Border Insolvency that was adopted in 1997.[184] Most important are articles 15 through 24, which address the recognition of foreign proceedings and the relief granted thereunder. Though it will take time to invade national statutes, the model law offers some guidance in arriving at fair treatment and achieving some degree of uniformity.

F. Contract as Salvation?

Contract as salvation is also proposed for bankruptcy.[185] But here additional doubts arise. Does it benefit small creditors without a legal department or without a Wall Street firm connection? Are these creditors sufficiently informed to make a reasonable choice? Will they have enough bargaining power to assert their interests? What about their position in a particular jurisdiction when all of a sudden this jurisdiction becomes attractive for out-of-state or even offshore creditors? Will local creditors be able to compete with them? Will local authorities start to compete for the favor of strong creditors or strong debtors? The belief in the justice of contract is based on particular concepts of economic homogeneity, which we cannot take for granted—particularly on the international scene. The justice of contract is also based on the assumption of similarly "culturally imprinted" partners—but this similarity cannot be expected internationally.

VII. International Mergers

A. Daimler/Chrysler[186]

The loss of distance and the reduction of coordination costs encourage and facilitate transborder mergers. This is one of the main reasons why the need to find new avenues

180. *See* Leonard, *supra* note 167, at 549.

181. *See* John A. Barrett, *Various Legislative Attempts with Respect to Bankruptcies Involving More Than One Country*, 33 Tex. Int'l L.J. 557 (1998).

182. Convention on Insolvency Proceedings, Nov. 23, 1996, 35 I.L.M. 1223.

183. *See* Barrett, *supra* note 181.

184. National Bankruptcy Review Commission, *Report of the National Bankruptcy Review Commission* (Oct. 20, 1997), *at* http://www.nbrc.gov/reporttitleg.html; *see* Barrett, *supra* note 181.

185. *See* Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 Yale L.J. 1807 (1998).

186. *See* Theodor Baums, *Verschmelzung mit Hilfe von Tochtergesellschaften*, *in* Festschrift fuer Wolfgang Zoellner, *supra* note 85, at 65; Theodor Baums, *Corporate Contracting Around Defective Regulations: The Daimler-Chrysler Case*, 155 J. Institutional & Theor. Econ. 119 (1999); Thomas P. O'Toole, *The Long Arm of the Law—European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas*, 11 Transnat'l Law. 203 (1998).

and bridges is not only felt by governments but also by corporate actors themselves. The growing number of cross-border mergers or quasi-mergers shows this clearly; they are prime examples for how contractual arrangements and clever adaptations may bring different corporate cultures together. Today the industry standard is set by the Daimler/Chrysler business combination; it was structured along particular conflict-of-laws rules[187] and particular accounting rules for mergers.[188] The transaction received its characteristic color by the fact that "two fundamentally different legal systems" had to be linked with each other.[189]

B. Conflict of Laws

The problems started with the German conflict-of-laws rules on transnational mergers under the seat theory.[190] They prevent a direct cross-border merger whereby Chrysler Corporation merged directly into DaimlerChrysler AG (transfer of all the assets). Accordingly, the German Transformation Act only provides for domestic mergers and not cross-border mergers.[191] This restrictive approach is motivated by two concerns: if a foreign corporation merges into a German corporation, it transfers its debts to the newly combined firm. But can the exact amount of the debts be found out? Are the foreign balance sheets reliable; are all risks taken into account? What about risks Germans are not or not to the same extent familiar with, for example, product liability and punitive damages? Similar problems arise with regard to accounts receivable: is the debtor's position comparable to what Germans have in mind when they use the term "debt"? Are there substantially different modes of execution; are there different reorganization procedures or more shelters for debtors? Add to these concerns some technical aspects: merging two companies is an intricate matter anyhow; it might run out of proportions when the corporate structures are difficult to compare.

C. Merger Accounting

However, the issue that stands out is the accounting aspect. Daimler-Benz AG had already changed over to the GAAP to create an "acquisition currency" in the United States.[192] Therefore, the merger could be handled according to American accounting rules. The clues were the rules on merger accounting (accounting for business combinations).[193]

In a business combination, corporations are brought together into an accounting unity that carries on the activities of the previously separate, independent corporations. For such transactions, two methods of accounting are available: "purchase" and "pooling of interests." Both are acceptable, though not as alternatives for the same business combination;

187. *See supra* Part IV.B.1.

188. *See supra* Part V.C.1. and *infra* Part VII.C.

189. Joint Report of the Management Boards of Daimler-Benz Aktiengesellschaft and DaimlerChrysler AG regarding the Business Combination of Daimler-Benz Aktiengesellschaft and the Chrysler Corporation into DaimlerChrysler AG 36 (Aug. 6, 1998), *available at* http:www.daimler-benz.com/ind_gfnav_e.html?/categor/news/text/80806a_e.htm [hereinafter Joint Report].

190. *See supra* Part III.B.1.

191. *See* Bernhard Grossfeld, *Internationales Umwandlungsrecht*, Die Aktiengesellschaft (AG) 302 (1996).

192. *See supra* Part V.A.

193. *See* Accounting Principles Board, Opinion No. 16: Business Combinations (1970).

the choice depends on specific conditions. The pooling of interests method is required when specified conditions are met, in particular, with regard to the exchange of shares. In this case, the assets and the liabilities of the corporation are combined at their recorded values, a new basis of accounting is not allowed, and no position for goodwill arises.

If these requirements are not met, then the business corporation is treated as an acquisition of one or more companies under the purchasing method. The cost to the acquiring corporation will be allocated to identifiable assets acquired and liabilities assumed based on their fair values; the unallocated cost will be carried on as goodwill and will be written off over forty years.

D. Pooling of Interests

The pooling of interests method applies when two or more companies combine by the exchange of equity securities (merger of equals). The transaction is not seen as an acquisition because it is accomplished without disbursing resources of the constituents. The ownership interests continue and the former basis of accounting is retained; the assets and liabilities are carried forward at their recorded amounts. Most combinations today are structured as pooling of interests profits. This avoids a goodwill position (in this case, about DM 54 billion, and a write-off over forty years that would diminish future profits). Power of accounting as a language!

> The significantly different results of applying the purchase and pooling of interests methods of accounting to a combination effected by an exchange of stock stem from distinct views of the nature of the transaction itself. Those who endorse the pooling of interests method believe that an exchange of stock to effect a business combination is in substance a transaction between the combining stockholder groups and does not involve the corporate entities. The transactions therefore neither requires nor justifies establishing a new basis of accountability for the assets of the combined corporation. Those who endorse the purchase method believe that the transaction is an issue of stock by a corporation for consideration received from those who become stockholders by the transaction. The consideration received is established by bargaining between independent parties, and the acquiring corporation accounts for the additional assets at their bargained—that is, current—values.[194]

Based on this concept, the combining of existing voting common stock is the essence of a business combination under the pooling of interests method: "The separate stockholder interests lose their identities and all shares mutually in the combined risks and rights."[195] This idea of mutual sharing (merger of equals) governs the particular details. It is incompatible with this concept that the exchange of stock alters relative voting rights resulting in preferential claims for some stockholders, or that significant minority interests continue to exist. The acquiring corporation must offer and issue common stock with rights identical to those of the majority of its outstanding voting common stock. This stock is to be exchanged for substantially all of the voting common stock interest of the other corporation; substantially all of the voting common stock means ninety percent or more.[196]

Presently, the rule is under close scrutiny and stricter limits or even a ban on the use of the method is discussed. The critical issue is that the method might not sufficiently disclose

194. *Id.* § 16.
195. *Id.* § 47.
196. *See id.*

to shareholders the real costs of the transactions (the costs for the good will that have to be depreciated over time). The SAB is considering whether to allow pooling only for a small number of cases where two corporations of equal size decide to merge: "The board will discuss whether the rule can be written in a way that would prevent companies of unequal sizes from finding ways to squeeze through loopholes so that they can still use pooling accounting."[197]

E. Structure of the Merger

The actual structure of the Daimler-Benz/Chrysler merger followed exactly these guidelines. It depended vitally on the application of the GAAP and their pooling rules. It is a prime example for the overwhelming power of accounting on corporate transactions, a power that is beyond the recognition of most lawyers.

Instead of a direct cross-merger, the first stage was entered with setting up the DaimlerChrysler AG in Germany, the corporate structure of which duplicates that of the Daimler-Benz AG. Then the DaimlerChrysler AG submitted to the Daimler-Benz shareholders an offer to exchange their shares for the issuance of new DaimlerChrysler shares (capital increase by way of contribution in kind, "Daimler-Benz Capital Increase"). Consequently, the Daimler-Benz AG became a subsidiary of DaimlerChrysler AG. Concurrently, the entire interest in the Chrysler Corporation was exchanged for the issuance of further new shares in the DaimlerChrysler AG (capital increase by way of contribution in kind, "Chrysler Capital Increase"). The Chrysler shares had before been acquired by a U.S. exchange agent expressly appointed for this merger by way of a reverse triangular merger under Delaware law. In the second stage, the Daimler-Benz AG that had first been turned into a subsidiary was merged into the DaimlerChrysler AG ("Daimler-Benz Merger"). The purpose of this merger was to squeeze out shareholders who had not voluntarily accepted the original Exchange Offer.

This was the result: Daimler-Benz AG disappeared into DaimlerChrysler AG with all shareholders of Daimler-Benz now being shareholders of DaimlerChrysler AG. Chrysler Corporation was turned into a wholly-owned subsidiary of DaimlerChrysler AG and changed its name to Daimler-Chrysler Corporation.

The merger of equals concept figured prominently in these procedures. The original exchange ratio in the Daimler-Benz capital increase was one DaimlerChrysler share for one Daimler-Benz share. If, however, more than ninety percent of the Daimler-Benz shares were exchanged, then the ratio was 1.005 DaimlerChrysler share for one Daimler-Benz share. This was meant as an enticement to meet the ninety percent benchmark and reflected the accounting realities.[198] Power of signs: as no goodwill had to be recorded, no reduction of future earnings had to be feared. This reality is, however, not beyond doubts. As mentioned,[199] critics argue that the approach allows managers to make expensive acquisitions with shareholders' money without recording the price of these decisions in the accounting ledgers.

197. Melody Petersen, Accounting for Mergers May Change, N.Y. Times, Apr. 21, 1999, at C3.
198. *See supra* Part V.A.-E.
199. *See* Petersen, *supra* note 199.

F. Fundamentally Different Legal Systems

Notwithstanding intricate technicalities, this was not enough to arrive at a globally acceptable corporate structure. The Joint Report explains the situation as follows:

> In the Business Combination Agreement the parties agreed to an overall plan for the business combination of Daimler-Benz AG and the Chrysler Corporation into the DaimlerChrysler AG.
>
> Agreements of this type are rare under German domestic law since corporate actions necessary for the implementation of a business combination (such as capital increases and mergers) already require separate agreements in accordance with the detailed provisions of the Stock Corporation Act (Aktiengesetz) and the Transformation Act (Umwandlungsgesetz).
>
> The proposed business combination of Daimler-Benz AG and Chrysler Corporation involves, however, two fundamentally different legal systems. In order to ensure the necessary legal certainty of both companies, it was necessary to set forth the overall planning in one agreement, namely the Business Combination Agreement, in accordance with U.S. practice. The agreement is subject to the laws of the State of Delaware (U.S.A.) whose laws also govern the Chrysler Corporation. The management of Daimler-Benz AG agreed to this choice of law since the Daimler-Benz Capital Increase and the Daimler-Benz Merger must ultimately be implemented according to German corporate law and German corporate transformation law.[200]

This agreement was regarded to be vitally important for the overall structure. Therefore, it needed and received approval by seventy-five percent of the shareholders present at the general meeting; a consequence of the famous Holzmueller doctrine[201] and by analogy to the German Transformation Act.

G. Details of the Business Combination Agreement

The Business Combination Agreement deals extensively with the corporate governance of the newly created DaimlerChrysler AG, in particular with the impact of the German codetermination concept (article IV). For the future, the Joint Report[202] announces a "Chairman Integration Council" with seven members. This Council lies "at the heart of the management structure." Guidelines are set for the compensation structure for executives. In addition, the Agreement settles the employee benefit matters (article VIII).

Most interesting are the provisions concerning the applicable law and questions of personal jurisdiction. The German law is the "governing law" for the Daimler-Benz Merger (to the extent executed in Germany), for the Daimler-Benz Capital Increase, and for the Chrysler Capital Exchange. In all other respects, the Agreement shall be governed by Delaware law without regard to the principles of conflict of laws thereof.[203] With regard to the Agreement and any of the transactions contemplated by it, the parties consented to submit themselves to any federal court located in the state of Delaware or any Delaware state court. They agreed not to deny or defeat such jurisdiction and not move to dismiss on the grounds of forum non conveniens. The parties also promised not to bring any action in the matters mentioned above in any other court and they waived any right to trial by jury.[204]

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200. Joint Report, *supra* note 191, at 36.

201. *See* Richard M. Buxbaum, *Extension of Parent Company Shareholders' Rights to Participate in the Governance of Subsidiaries*, 31 Am. J. Comp. L. 511 (1983).

202. Joint Report, *supra* note 191, at 45.

203. *Id.* § 12.4.

204. *See id.* § 12.15.

H. Ethics

It could be argued that global standards are not a matter of prime concern as some glitches in these concepts might be locked up in view of responsible actors, in view of corporate ethics.[205] Can we rely on ethics? What are "ethics" in a global economy when corporations "have no soul?"[206] Are we out for an elusive euphemism—in view of the "obvious multiplicity of global disparate qualities and values"?[207] Let's be honest: "the achievement of an effective, desirable system of universal ethics in a global economy is more fanciful than realistic. Nationalism in economics is unlikely to be ceded to generally observable systems of global ethics."[208] But is it wholly fantasy? Joseph Auerbach gives the following answer:

> An ethics system which attracts adherents must have at its core two essential characteristics: it must be more persuasive to international businesses and their home governments as an economic incentive than a rash, heedless view of the consequences of less than ethical economic behavior; and the system must rely for effectiveness not on laws but on persons, who are the overseers, stewards and executive managers of the global businesses, having intrinsic qualities of character likely to produce internationally acceptable unpremeditated ethical responses to business questions.[209]

The soul must be found in individuals. In an 1837 corporation case it was said:

> A corporation cannot blush. It has a body it was true; had certainly a head—a new one every year . . . Arms he supposed it had, and long ones, too, for it could reach at any thing. Legs, of course, when it made such long strides. A throat to swallow the rights of the community, and a stomach to digest them! But whoever yet discovered, in the anatomy of any corporation, either bowels, or a heart?[210]

For ethics the focus has to be on individuals and on excellence in strategic management. Only then can we hope for "establishing a system of business ethics with global significance."[211] These hopes might get some support from internal codes of conduct set up by individual corporations.[212] They are sometimes regarded with skepticism but they set a benchmark to be met and expose these corporations to an enhanced public scrutiny. In the field of labor conditions additional factors come in supporting each other and increasing the impact: humanitarian impulses, public pressure from abroad, concern for brand name, and corporate image.

VIII. Conclusion

Certainly, there is a loss of distance, but this does not mean the end of geography. The virtual world is not the world as long as human beings continue to see the world as geography,[213] and as long as culture is derived from *colere, cultus*, which means "to cultivate the

205. For a critical view, see Auerbach, *supra* note 74.
206. *Id.* at 177.
207. *Id.* at 170.
208. *Id.* at 173.
209. *Id.*
210. *Id.* at 178.
211. *Id.* at 181.
212. Toftoy, *supra* note 30, at 905.
213. *See* Eric Peterson et al., *Semantic Typology and Spatial Conceptualization*, 74 Language 557 (1998).

earth." Even in a global market in a virtual world, business is local and the point of sale determines the economic success. The national states are still very important players as they only have the power to enforce legal norms that constitute and limit even global markets. Law has always been and will continue to be a system of sufferance[214] interacting with markets and localities.[215] But the relation between each other is in flux. Global markets will diminish the sovereign powers of states that depend on control over territory and borders. But by the same token, the longing for "feeling at home" will flourish because human beings need homes. They are exposed to different geographical pictures and to different semiotic systems,[216] which will lead them to see even the virtual world differently. That makes unification and harmonization in international corporation law not futile—but very difficult.[217]

However, it is clear that the traditional balance based on distance will change, and that in-border concepts will come under increased scrutiny. The newly emerging structures will not follow a unitary pattern as the balance has to be found in various fields according to the characteristics of different assets, know-how, and markets. There is no single solution! Predictions are difficult to make, as we do not know how order grows from chaos.[218] Trial and error will continue to be our companions. But this is a challenge and no reason for resignation: "The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity."[219] This is the poetry (creativity) of law: "To compose an order which the bewildered, angry heart can recognize. To imagine man."[220] Geopolitical power is not the answer if we want to keep the international system honest. Even states that wield great political and economic power are not fully independent. They "remain[n] exposed to the risks created by a robust and largely unmastered global economy,"[221] and they remain exposed to the power of the Internet to circumvent its sovereignty. They may try to master this by a kind of "empirical overstretch" but the risks are that they will go over the brink somewhere and sometime. Patient cooperation seems to be the better solution: we have the choice between more conflicts or more common solutions.[222] The loss of distance on global markets forces us to accept and to pursue a shared values approach.[223]

214. *See* BERNHARD GROSSFELD, RECHT ALS LEIDENSORDNUNG (1998).

215. *Cf.* Karl Schloegel, *Die Wiederkehr des Raumes*, FRANKFURTER ALLGEMEINE ZEITUNG, BILDER UND ZEITEN JUNE 19, 1999, No. 139.I.

216. *See* Grossfeld, *supra* note 47.

217. *Cf.* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996). For a different view, see Klaus Peter Berger, *Einheitlich Rechtsstrukturen durch aussergesetzliche Rechtsvereinheitlichung, in* JURISTENZEITUNG (JZ) 36 (1999); *see also* KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999).

218. *See* Bernhard Grossfeld, *The Invisible Hand: Pattern of Order in Comparative Law*, J.S. AFRICAN L. 648 (1997).

219. MacLeish, *supra* note 22, at 1508.

220. *Id.*; *cf.* Holger Bonus, *Bildende Künste und Gentechnologie: Ueber Glaubwuerdigkeit, in* FESTSCHRIFT FUER GROSSFELD, supra note 75, at 103.

221. Paul B. Stephan, *Creative Destruction—Idiosyncratic Claims of International Law and the Helms-Burton Legislation*, 27 STETSON L. REV. 1342, 1364 (1998).

222. *See* Vagts, *supra* note 49.

223. *See* Bernhard Grossfeld & Paul Rogers, *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law*, 32 INT'L & COMP. L. Q. 931 (1983); Paul Rogers, *A Comment on the Extraterritorial Application of American Law in the 1990s, in* FESTSCHRIFT FUER GROSSFELD, *supra* note 75, at 901.